A **KAMDAR SDN BHD v. BIPINCHANDRA BALVANTRAI & ORS**

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
B [CIVIL APPEAL NO: W-02(NCC)(W)-1295-08-2015]
5 SEPTEMBER 2016

***CONTRACT:*** *Breach – Duties – Misappropriation of monies – Failure to consider pleaded case – Whether affected trial judge's approach to case before considering*
C *evidential record – Whether monies unlawfully utilised – Whether undue weight placed on hearsay ledger entries – Failure to refer or evaluate underlying documents – Whether there was examination on element of breach of trust, fiduciary duty or directors' duties – Whether doctrine of laches applied – Whether plaintiff accorded reasonable opportunity to be heard in full – Whether there was breach of natural*
D *justice in hearing of suit*

***CIVIL PROCEDURE:*** *Action – Cause of action – Breach of fiduciary duties – Misappropriation of monies – Allegation of – Failure to consider pleaded case – Whether affected trial judge's approach to case before considering evidential record – Whether monies unlawfully utilised – Whether undue weight placed on hearsay*
E *ledger entries – Failure to refer or evaluate underlying documents – Whether there was examination on element of breach of trust, fiduciary duty or directors' duties – Whether doctrine of laches applied – Whether plaintiff accorded reasonable opportunity to be heard in full – Whether there was breach of natural justice in hearing of suit*

F The plaintiff was a wholly owned subsidiary of a public listed company, Kamdar Group (M) Berhad ('KGMB'). The first defendant, Bipinchandra Balvantrai ('Bipinchandra'), was the Deputy Chairman and shareholder of the plaintiff, the second defendant, Jayesh R Kamdar Rajnikant ('Jayesh'), was the Executive Director of KGMB as well a group Chief Executive
G Officer of KGMB and the third defendant, Yap Kim Hong ('Yap'), was a contractor who undertook building works for the plaintiff. The plaintiff's claim against the three defendants was premised on misrepresentation, breach of statutory duties and breach of fiduciary duties by Bipinchandra and Jayesh in relation to the plaintiff. Yap was alleged to have dishonestly
H assisted Bipinchandra and Jayesh in the fraudulent breach of their fiduciary duties. It was further alleged that all three defendants had fraudulently applied to their own use the plaintiff's monies which had caused the plaintiff to suffer losses. The defendants were also alleged to be constructive trustees for the plaintiff in respect of such misapplied and misappropriated funds. The
I total loss alleged to be suffered by the plaintiff exceeded RM8,842,306. By way of relief, the plaintiff sought an account of the total monies of the plaintiff which had been misappropriated or misapplied by the defendants, as well as a disgorgement of all such monies. In essence, the plaintiff contended that the sum of RM8,842,306 was withdrawn by Bipinchandra

and Jayesh from the plaintiff's bank account in breach of the duties and obligations owed by them to the plaintiff. These monies were withdrawn *vide* four cheque transactions between 23 March 2005 and 26 March 2005: (i) the first cheque was for a sum of RM5,762,306 which was utilised for the purchase of undersubscribed shares in the course of the listing exercise for KGMB which were then placed in the Central Depository System (CDS) account of Yap, (ii) the second cheque was in the sum of RM2,420,000 and encashed by either Bipinchandra and/or Jayesh, and the monies allegedly misappropriated or applied by them for their own use; (iii) the third and fourth cheques in the sums of RM580,000 and RM80,000 respectively, were made out to Jayesh. The defendants contended that these cheque transactions were in reality an advance or loan authorised and directed by another director, HM Kamdar (now deceased), the then Chairman of the plaintiff. As such, the defendants, more so Bipinchandra and Jayesh, maintained that no liability was attached to them in relation to the plaintiff's claims as the monies were withdrawn at the behest of, and for the benefit of HM Kamdar. As for Yap, he stated that he had acted as a nominee for Bipinchandra, who instructed him to open a central depository account for the purpose of placement of these shares. Yap further maintained that he never received any benefits from these shares and passed on all dividends and sale proceeds to Bipinchandra or upon his instructions to Jayesh. The trial judge concluded that the single or pivotal issue before the court was whether the four cheque transactions were indeed loans by the plaintiff to HM Kamdar and dismissed the plaintiff's action. Hence, this appeal by the plaintiff. The plaintiff's complaint was that the trial judge failed to appreciate or misunderstood the plaintiff's pleaded case which affected his approach to the plaintiff's case even before he went on to consider the evidential record. The plaintiff submitted that the case and evidence as a whole was not considered in its entirety. Ultimately, the critical question to be answered by this court in the exercise of its review function was whether, on an objective assessment, were the trial judge's reasons in his judgment, considered in the context of the evidentiary record, the issues as they emerged at trial and the submissions of counsel, such as to warrant a conclusion that no reasonable judge could have come to the conclusion that the trial judge reached.

**Held (allowing appeal; setting aside judgment of High Court)**
**Per Nallini Pathmanathan JCA delivering the judgment of the court:**

**(1)** The trial judge misunderstood or failed to consider the plaintiff's pleaded case. This was because he had determined that the sole issue determinative of this case was whether the four transactions or withdrawals were in fact loans or advances to HM Kamdar. The plaintiff's causes of action premised on a fraudulent breach of trust, breach of fiduciary duties and breaches of directors' duties were disregarded. This affected his approach to the plaintiff's case even before he came to consider the evidence. (para 104)

**(2)** The trial judge failed to appreciate the full purport of PW1's evidence to conclude that the four withdrawals of the plaintiff's funds were loans to HM Kamdar. He failed to consider PW1's evidence that normally all loans were supported by documentary evidence. He also failed to appreciate the significance of PW1's evidence to the effect that she had no knowledge of how the monies were utilised and if she had known that they were being utilised to purchase KGMB shares she would have been concerned because that was an unlawful use of the plaintiff's monies. PW1's evidence could not amount to primary evidence of the nature and purpose of the withdrawals as she had no knowledge of the same. The trial judge failed to pay heed to the material evidence underlying the transactions which disclosed that the monies had been utilised to purchase undersubscribed shares of KGMB and possibly for utilisation by Bipinchandra and/or Jayesh. (para 104)

**(3)** The trial judge erred in placing undue weight on the ledger entries and their description on the basis that it was contemporaneous evidence of the utilisation of the funds. The trial judge failed to consider that the entries were mere 'hearsay' entries by PW1 at the behest of HM Kamdar and/or Jayesh and Bipinchandra. He failed to give any or adequate consideration to the underlying documents such as the letters pertaining to the first withdrawal, the encashment of the second withdrawal, the third withdrawal and the interbank transfer of the fourth withdrawal. In this context, these underlying documents were neither referred to nor evaluated. (para 104)

**(4)** The trial judge failed to provide adequate reasoning for his outright rejection of the special audit report and the evidence of the auditors. The trial judge had rejected the report on the basis that it was incredulous as it did not rely on PW1's evidence and the general ledger to conclude that the withdrawals were loans or advances. The trial judge failed to recognise that in order to ascertain the true nature of the withdrawals as it was necessary to consider the documentary evidence which showed the utilisation of the funds. The auditors did in fact do so, and reached conclusions premised upon such documentary evidence, as well as the absence of documentary evidence in support of the contention that the withdrawals were all loans to HM Kamdar. The trial judge failed to give any or adequate consideration to the special audit report in this context and his reasons for rejecting the report were insufficient and inadequate. (para 104)

**(5)** The trial judge failed to give consideration to the evidence of the defendants, or to make findings in relation to their credibility. Given the considerable documentary and oral evidence (particularly from Yap) as to the utilisation of the plaintiff's funds, no findings were made as to whether the directors had personally benefited from the plaintiff's funds. This was the crux of the plaintiff's case and the defendants' defence, yet

there was no examination of the elements of a breach of trust, breach of fiduciary duty or breaches of directors' duties. The trial judge also fell into error when he held that the doctrine of laches applied and that precluded the plaintiff from being granted a remedy. In this context, the trial judge failed to consider the evidence adduced at trial to the effect that the four impugned transactions relating to the plaintiff's monies were kept within the knowledge of only Bipinchandra and Jayesh and were never reported to the plaintiff's board of directors or the shareholders at general meetings. In other words, the withdrawal and utilisation of the plaintiff's monies in this manner was kept concealed from the other directors of the plaintiff and KGMB as well as the shareholders, until full disclosure came about *vide* the special audit report. The trial judge disregarded this salient evidence determining that time began to run from the date when these withdrawals were effected. (para 104)

**(6)** The trial judge in evaluating the evidence as a whole failed to consider material and relevant evidence and relied primarily on part of the evidence of one witness to reach a conclusive determinative of the entire case but failed to consider the pleaded case of the plaintiff. The nett result was that the plaintiff was not accorded a reasonable opportunity to be heard in full. A large expanse of material and relevant evidence adduced at trial was simply not considered by the trial judge. A reading of the full transcripts of both the evidence and submissions, and the judgment itself did not suggest that there was a complete review of material evidence. (paras 99 & 104)

**(7)** The appellant's case and the respondents' case were not heard nor considered in full. This amounted to a breach of natural justice. There was a miscarriage of justice in the hearing of this suit. This court remitted this case for re-hearing to the High Court. It would not be tenable for this court to undertake the task of making primary findings of fact in respect of the numerous issues that had not been addressed in the current judgment. (paras 111 & 112)

***Bahasa Malaysia*** *Headnotes*

Plaintif adalah anak syarikat milik penuh sebuah syarikat tersenarai awam, Kamdar Group (M) Berhad ('KGMB'). Defendan pertama, Bipinchandra Balvantrai ('Bipinchandra'), adalah Timbalan Pengerusi dan pemegang saham plaintif, defendan kedua, Jayesh R Kamdar Rajnikant ('Jayesh'), adalah pengarah eksekutif KGMB dan Ketua Pegawai Eksekutif Kumpulan KGMB dan defendan ketiga, Yap Kim Hong ('Yap'), adalah seorang kontraktor yang menjalankan kerja-kerja bangunan bagi plaintif. Tuntutan plaintif terhadap ketiga-tiga defendan adalah berdasarkan kepada salah nyataan, pelanggaran kewajipan statutori dan pelanggaran kewajipan fidusiari oleh Bipinchandra dan Jayesh berhubungan dengan plaintif. Yap didakwa membantu Bipinchandra dan Jayesh secara curang dalam pelanggaran

kewajipan fidusiari mereka. Juga dihujahkan bahawa ketiga-tiga defendan adalah peserta dalam penipuan dan menggunakan wang plaintif secara frod menyebabkan plaintif mengalami kerugian. Defendan-defendan juga didakwa menjadi pemegang amanah konstruktif bagi plaintif berkenaan dengan dana yang disalahgunakan. Keseluruhan kerugian yang dialami plaintif melebihi RM8,842,306. Melalui relif, plaintif menuntut akaun keseluruhan wang plaintif yang telah disalahgunakan oleh defendan-defendan, dan juga unjuran wang tersebut. Dalam intipati, plaintif menghujahkan bahawa jumlah RM8,842,306 dikeluarkan oleh Bipinchandra dan Jayesh dari akaun bank plaintif iaitu satu pelanggaran kewajipan dan obligasi mereka kepada plaintif. Wang ini dikeluarkan melalui empat transaksi cek antara 23 Mac 2005 dan 26 Mac 2005: (i) cek pertama untuk jumlah RM5,762,306 yang digunakan untuk membeli saham kurang dilanggan dalam usaha penyenaraian KGMB yang kemudian ditempatkan dalam akaun Central Depository System (CDS) milik Yap; (ii) cek kedua dalam jumlah RM2,420,000 dan ditunaikan oleh Bipinchandra dan/atau Jayesh, dan wang yang didakwa disalahgunakan oleh mereka untuk kegunaan mereka; (iii) cek ketiga dan keempat dalam jumlah RM580,000 dan RM80,000 disediakan untuk Jayesh. Defendan-defendan menghujahkan bahawa transaksi cek-cek ini adalah secara realiti satu pendahuluan atau pinjaman yang diberi kuasa dan diarahkan oleh pengarah yang lain, HM Kamdar (sudah meninggal dunia), pengerusi plaintif waktu itu. Oleh itu, defendan-defendan, Bipinchandra dan Jayesh, mengekalkan bahawa mereka tidak mempunyai liabiliti berhubungan dengan tuntutan plaintif kerana wang yang dikeluarkan adalah atas perintah dan untuk manfaat HM Kamdar. Bagi Yap pula, dia menyatakan bahawa dia bertindak sebagai penama untuk Bipinchandra, yang mengarahkannya membuka satu akaun pusat depositori untuk tujuan penempatan saham-saham ini. Yap juga mengekalkan bahawa dia tidak menerima apa-apa faedah daripada saham-saham tersebut dan memberikan dividen dan hasil jualan kepada Bipinchandra atau, atas arahannya, kepada Jayesh. Hakim bicara membuat kesimpulan bahawa isu tunggal atau penting di hadapan mahkamah adalah sama ada empat transaksi cek adalah pinjaman plaintif kepada HM Kamdar dan menolak tindakan guaman plaintif. Oleh itu, rayuan ini oleh plaintif. Plaintif menghujahkan bahawa hakim bicara gagal menghargai atau telah salah faham kes yang diplidkan oleh plaintif yang telah menjejaskan pendekatannya kepada kes plaintif sebelum beliau mempertimbangkan rekod keterangan. Plaintif menghujahkan bahawa kes dan keterangan tidak dipertimbangkan secara keseluruhan. Akhirnya soalan kritikal yang perlu dijawab mahkamah ini dalam menjalankan fungsi semakan adalah: sama ada, atas penilaian objektif, adakah alasan hakim bicara dalam penghakimannya yang dipertimbangkan dalam konteks rekod keterangan, isu-isu yang dibangkitkan semasa perbicaraan dan hujahan peguam-peguam, mewajarkan pemutusan bahawa tiada hakim bicara yang munasabah akan mencapai kesimpulan yang dicapai oleh hakim bicara ini.

**Diputuskan (membenarkan rayuan; mengetepikan penghakiman Mahkamah Tinggi)**
**Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:**

**(1)** Hakim bicara tersalah faham atau gagal mempertimbangkan kes plaintif yang diplidkan. Ini adalah kerana beliau telah menentukan bahawa isu tunggal penentuan kes ini adalah sama ada empat transaksi atau pengeluaran adalah pinjaman atau pendahuluan kepada HM Kamdar. Tindakan guaman plaintif berdasarkan penipuan pecah amanah, pelanggaran kewajipan fidusiari dan pelanggaran kewajipan pengarah-pengarah telah diketepikan. Ini telah menjejaskan pendekatan beliau kepada kes plaintif sebelum mempertimbangkan keterangan.

**(2)** Hakim bicara gagal menghargai keterangan PW1 sepenuhnya untuk memutuskan bahawa empat pengeluaran dana plaintif itu adalah pinjaman kepada HM Kamdar. Dia gagal mempertimbangkan keterangan PW1 bahawa semua pinjaman disokong oleh keterangan dokumentar. Beliau juga gagal menghargai kepentingan keterangan PW1 bahawa dia tidak mempunyai pengetahuan bagaimana wang itu digunakan dan jika dia mengetahui bahawa wang itu digunakan untuk membeli saham KGMB dia akan khuatir kerana itu dianggap satu salah gunaan dana plaintif. Keterangan PW1 tidak akan berjumlah kepada keterangan utama sifat dan tujuan pengeluaran dana itu kerana dia tidak mempunyai pengetahuan berkenaannya. Hakim bicara gagal memberikan perhatian kepada keterangan material mendasari transaksi yang mendedahkan bahawa wang telah digunakan untuk membeli saham kurang dilanggan KGMB dan mungkin untuk kegunaan Bipinchandran dan/atau Jayesh.

**(3)** Hakim bicara terkhilaf apabila meletakkan penekanan tidak wajar ke atas catatan lejar dan huraiannya atas dasar bahawa ia adalah keterangan semasa penggunaan dana itu. Hakim bicara gagal mempertimbangkan bahawa catatan itu adalah catatan dengar cakap oleh PW1 atas perintah HM Kamdar dan/atau Jayesh dan Bipinchandra. Beliau gagal memberikan pertimbangan yang mencukupi kepada dokumen-dokumen mendasari seperti surat berkenaan pengeluaran pertama, penunaian pengeluaran kedua, pengeluaran ketiga dan pemindahan antara bank pengeluaran keempat. Dalam konteks ini, dokumen-dokumen mendasari tidak dirujuk atau dinilai.

**(4)** Hakim bicara gagal menyediakan alasan yang mencukupi untuk keputusannya menolak laporan audit khas dan keterangan juruaudit. Hakim bicara menolak laporan tersebut berdasarkan ketidakpercayaannya kerana ia gagal bergantung kepada keterangan PW1 dan lejar am untuk memutuskan bahawa pengeluaran adalah pinjaman atau pendahuluan. Hakim bicara gagal mengiktiraf bahawa untuk memastikan sifat benar pengeluaran, adalah perlu untuk mengambil kira keterangan dokumentar yang menunjukkan penggunaan dana. Juruaudit berbuat demikian, dan mencapai keputusan berdasarkan keterangan dokumentar, dan juga

ketidakhadiran keterangan dokumentar menyokong hujahan pengeluaran adalah pinjaman kepada HM Kamdar. Hakim bicara gagal memberikan apa-apa pertimbangan mencukupi kepada laporan audit khas dalam konteks dan alasannya menolak laporan adalah tidak memadai dan tidak mencukupi.

**(5)** Hakim bicara gagal mempertimbangkan keterangan defendan-defendan, atau membuat apa-apa dapatan berhubungan kebolehpercayaan mereka. Memandangkan terdapat keterangan dokumentar dan lisan (terutamanya dari Yap) berkenaan penggunaan dana plaintif, tiada dapatan dibuat sama ada pengarah-pengarah secara peribadi mendapat manfaat daripada dana plaintif. Ini adalah pokok kes plaintif dan pembelaan defendan, tetapi tiada pemeriksaan dibuat ke atas elemen-elemen pecah amanah, pelanggaran kewajipan fidusiari atau pelanggaran kewajipan pengarah-pengarah. Hakim bicara juga terkhilaf apabila memutuskan doktrin kelengahan diguna pakai dan menghalang plaintif daripada diberikan remedi. Dalam konteks ini, hakim bicara gagal mempertimbangkan keterangan yang dikemukakan di perbicaraan yang membawa kesan bahawa empat transaksi yang dipertikaikan berhubungan dengan wang plaintif disimpan dalam pengetahuan Bipinchandra dan Jayesh sahaja dan tidak dilaporkan kepada lembaga pengarah plaintif atau pemegang-pemegang saham di mesyuarat-mesyuarat agung. Dalam erti kata lain, pengeluaran dan penggunaan wang plaintif secara begini telah disembunyikan dari pengarah-pengarah plaintif dan KGMB yang lain serta pemegang-pemegang saham, sehingga pendedahan sepenuhnya muncul melalui laporan audit khas. Hakim bicara telah mengetepikan keterangan penting ini yang menentukan bahawa masa mula berjalan dari tarikh pengeluaran-pengeluaran ini dikesan.

**(6)** Hakim bicara dalam menilai keterangan pada keseluruhannya gagal mempertimbangkan keterangan material dan relevan dan bergantung terutamanya kepada sebahagian keterangan satu saksi untuk mencapai penentuan muktamad mengenai keseluruhan kes tetapi gagal mempertimbangkan kes yang diplidkan oleh plaintif. Akibatnya, plaintif tidak diberikan peluang yang munasabah untuk didengar sepenuhnya. Keterangan material dan relevan yang terbentang luas dikemukakan semasa perbicaraan tidak dipertimbangkan oleh hakim bicara. Satu bacaan transkrip-transkrip keterangan dan hujahan keseluruhannya dan penghakimannya sendiri tidak menunjukkan bahawa terdapat semakan sepenuhnya ke atas keterangan material.

**(7)** Kes perayu dan kes responden tidak didengar atau dipertimbangkan secara sepenuhnya. Ini berjumlah kepada satu pelanggaran keadilan asasi. Terdapat satu salah laksana keadilan dalam perbicaraan guaman ini. Mahkamah ini meremitkan kes ini untuk perbicaraan semula ke Mahkamah Tinggi. Tidak wajar untuk mahkamah ini melaksanakan tugas membuat penemuan utama fakta berhubungan dengan beberapa isu yang belum ditangani dalam penghakiman semasa.

**Case(s) referred to:**

*Beacon Insurance Company Limited v. Maharaj Bookstore Limited [2014] UKPC 21* ***(refd)***
*Dr Lo Sook Ling Adela v. Au Mei Yin Christina & Anor [2002] 1 SLR 408* ***(refd)***
*Elliston v. Glencore Services (UK) Ltd [2016] EWCA CIV 407* ***(refd)***
*Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5, [2014] ETMR 26* ***(refd)***
*Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***
*Gwembe Valley Development Company Ltd v. Koshy [2003] EWCA Civ 1048* ***(refd)***
*Housen v. Nikolaisen 2002 SCC 33* ***(refd)***
*In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911* ***(refd)***
*Majuikan Sdn Bhd v. Barclays Bank plc [2014] 9 CLJ 337 CA* ***(refd)***
*Sakthivel Punithavathi v. PP [2007] 2 SLR 983* ***(refd)***
*Thomas v. Thomas [1947] AC 484* ***(refd)***
*Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC* ***(refd)***
*UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC* ***(refd)***
*Watson Farley and Williams v. Ostrovizky [2015] EWCA Civ 457* ***(refd)***
*Yong Kheng Leong and Another v. Panweld Trading Pte Ltd and Another [2012] SGCA 59* ***(refd)***
*Yuill v. Yuill [1945] P 15* ***(refd)***

**Legislation referred to:**

Companies Act 1965, ss. 67, 132
Limitation Act 1953, s. 22(1)(a), (b)

**Other source(s) referred to:**

*For the appellant - Harpal Singh Grewal, Amrit Pal Singh, Julian Chan & Fuzail Rahmat; M/s Amrit & Company*
*For the 1st respondent - Cyrus Das & Abdul Rashid Ismail; M/s Rashid Zulkifli*
*For the 2nd respondent - Shahul Hameed Amirudin & Bryan Teo Wee Xim; M/s Zul Rafique & Partners*
*For the 3rd respondent - Ringo Low & Ting Lee Ping; M/s Ringo Low & Assocs*

*[Editor's note: For the High Court judgment, please see Kamdar Sdn Bhd v. Bipichandra Balvantrai & Ors [2015] 1 LNS 810 (overruled).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Nallini Pathmanathan JCA:**

### Introduction

**[1]** This appeal arises from the dismissal of the appellant's action in the court below. In these grounds, the parties will be referred to as they were in the High Court for expedience.

**[2]** The appellant company known as Kamdar Sdn Bhd was the plaintiff in the High Court ('the plaintiff'). The plaintiff was, and remains until today, a wholly owned subsidiary of a public listed company known as Kamdar Group (M) Berhad ('KGMB'). At the material time, in 2005, KGMB was in the process of being listed.

**[3]** The three respondents were the defendants in the court below. The three defendants are Bipinchandra a/l Balvantrai, the first defendant ('Bipinchandra'); Jayesh R Kamdar Rajnikant, the second defendant ('Jayesh') and Yap Kim Hong, the third defendant ('Yap Kim Hong').

**[4]** At all material times Bipinchandra was the Deputy Chairman and shareholder of the plaintiff, while Jayesh was the Executive Director of KGMB as well as group Chief Executive Officer of KGMB and its subsidiaries.

**[5]** Yap Kim Hong was a contractor who undertook building works for the plaintiff.

**Plaintiff's Multiple Causes Of Action Against The Defendants**

**[6]** The plaintiff's claim against the three defendants in the court below was premised on misrepresentation, breach of statutory duties and (fraudulent) breach of fiduciary duties by Bipinchandra and Jayesh in relation to the plaintiff. Yap Kim Hong was alleged to have dishonestly assisted Bipinchandra and Jayesh in the fraudulent breach of their fiduciary duties.

**[7]** It was further alleged that all three defendants were participants in a fraud and had fraudulently applied to their own use the plaintiff's monies. As a result of such misappropriation and/or misapplication of the plaintiff's monies, it was contended for the plaintiff that it had suffered loss.

**[8]** The defendants were also alleged to be constructive trustees for the plaintiff in respect of such misapplied or misappropriated funds. The total loss alleged to be suffered by the plaintiff exceeds RM8,842,306. By way of relief the plaintiff seeks an account of the total monies of the plaintiff misappropriated or misapplied by the defendants, as well as a disgorgement of all such monies.

**[9]** In essence, it was contended for the plaintiff that the sum of RM8,842,306 was withdrawn by Bipinchandra and Jayesh from the plaintiff's bank account in breach of the duties and obligations owed by them to the plaintiff. These monies were withdrawn *vide* four cheque transactions between 23 March 2005 and 26 March 2005.

**Details Of The Alleged Fraudulent Withdrawal And Utilisation Of The Plaintiff's Funds**

**[10]** The first cheque was for a sum of RM5,762,306, which was utilised for the purchase of undersubscribed shares in the course of the listing exercise for KGMB. The purchased undersubscribed shares were then placed in the Central Depository System (CDS) account of Yap Kim Hong. The plaintiff alleges that Yap Kim Hong was the nominee of Bipinchandra and/or Jayesh.

**[11]** The second cheque was in the sum of RM2,420,000 and encashed by either Bipinchandra and/or Jayesh, and the monies allegedly misappropriated or applied by them for their own use.

**[12]** The third and fourth cheques in the sums of RM580,000 and RM80,000 respectively, were made out to Jayesh. All the cheques were signed by Bipinchandra. All the cheques were issued without the authority of the plaintiff's Board of Directors.

**The Defences**

**[13]** For the defendants, in essence, it is contended that these cheque transactions and monies were in reality an advance or loan authorised and directed by another director, HM Kamdar, the then Chairman of the plaintiff. As such the defendants, more so Bipinchandra and Jayesh, maintain that no liability attaches to them in relation to the plaintiff's claims as the monies were withdrawn at the behest of, and for the benefit of HM Kamdar.

**[14]** Insofar as the first cheque in the sum of RM5,762,306 is concerned, Bipinchandra maintains that the monies were then applied as directed by HM Kamdar for the purchase of a large quantity of undersubscribed shares in relation to the impending listing of KGMB. Jayesh maintains that he had no knowledge that the monies utilised for the purchase of these undersubscribed shares came from the plaintiff.

**[15]** As for Yap Kim Hong, he states that he acted as a nominee for Bipinchandra, who instructed him to open a central depository account for the purpose of placement of these shares. He maintains that he did so because he had, and hoped to continue to undertake, building contract works for Kamdar as a group. Yap Kim Hong further maintains that he never received any benefits from these shares and passed on all dividends and sale proceeds to Bipinchandra or upon his instructions, to Jayesh.

**[16]** Both Bipinchandra and Jayesh offer no explanation in respect of the monies encashed *vide* the second cheque in the sum of RM2,420,000. Bipinchandra maintains that Jayesh took possession of the monies, while Jayesh maintains that it was Bipinchandra who took the monies.

**[17]** As for the third and fourth cheques which were made out to Jayesh, he maintains that the third cheque in the sum of RM580,000 which was banked into his account, was utilised for listing expenses, while the fourth cheque in the sum of RM80,000 was an incentive given to him for his work done on the listing of KGMB.

**[18]** There was also a counterclaim filed by Jayesh and Yap Kim Hong in the court below but the counterclaims, like the plaintiff's claim, were similarly dismissed and no relief was granted. There are no appeals in respect of these counterclaims.

## The Trial And The Judgment Of The High Court

**[19]** At the trial of this action, no less than seven (7) witnesses were called for the plaintiff while the defendants testified by way of defence and in support of their counterclaims. The evidence was not inconsiderable. Voluminous documentary evidence was also adduced before the court, including a special audit report on the four cheque transactions.

**[20]** The trial judge, by way of summary, in his judgment concluded that the single or "pivotal" issue before the court was whether the four cheque transactions were indeed loans or advances by the plaintiff to HM Kamdar (now deceased). His Lordship stated as follows in his judgment:

> Considering the factual matrix that has just been set out, my impression is that the outcome of this litigation must be considered on both the preliminary and pivotal issue of whether the four impugned payments were indeed loans or advances by the plaintiff to HM Kamdar. So although the parties had prior to the trial come up with a host of issues for trial, considering the evidence as a whole and the way in which the case was presented and the submissions advanced by the parties, it is convenient and appropriate at the outset to deal with the pivotal issue of whether the four payments were a loan or advance to HM Kamdar.

**[21]** The plaintiff's complaint in this context is that the learned trial judge failed to appreciate or misunderstood the plaintiff's pleaded case which affected his approach to the plaintiff's case even before he went on to consider the evidential record. By considering, in effect, the defence case as the pivotal issue, the learned judge failed to consider the pleaded causes of action, of breach of fiduciary duties (at common law) and breaches of statutory duties and directors' duties under the Companies Act 1965 *vis-a-vis* the first two defendants as well as dishonest assistance *vis-a-vis* the third defendant.

**[22]** It is contended in essence for the plaintiff that there should first have been an evaluation or analysis of the plaintiff's pleaded causes of action in order to ascertain whether the various *indicia* or elements of such causes of action were indeed made out.

**[23]** Insofar as the evidential record is concerned, the plaintiff's grievance in this appeal is that the learned trial judge failed to give any or adequate consideration to the bulk of the evidence adduced in court through the witnesses. By so doing, salient and material facts were not considered or simply ignored. This in turn, it is contended, affected the evaluation of the evidence as a whole, resulting in flawed or erroneous findings of fact. In short, the plaintiff's contention is that the trial judge's primary finding of fact, namely that the four transactions did indeed comprise simply loans or advances to HM Kamdar, was plainly wrong. This in turn, it is contended, amounts to a palpable and overriding error of fact, which warrants intervention by the appellate court in the exercise of its powers of review.

**[24]** The trial judge in arriving at this conclusion relied almost wholly on the evidence of a single witness, namely PW1, Ms Chia Lee Hoon, the Group Financial Controller of the Kamdar group ('PW1'). However, the plaintiff maintains that a fuller and more careful perusal of PW1's evidence discloses, *inter alia*, that she conceded or admitted that she had no knowledge that some of the monies were going to be utilised to purchase undersubscribed shares in the Kamdar listing. She expressly stated that this would amount to a wrongful or unlawful use of the plaintiff's funds. However, no consideration was given to this express admission or indeed the general tenor of PW1's evidence.

**[25]** The learned judge, it is contended, therefore failed to appreciate the totality of PW1's evidence and accepted only that part of her evidence, which supported the defendants' case. The learned judge thereby failed to evaluate or analyse PW1's evidence as a whole, accurately or correctly. This in turn, it is contended had a material impact on the ultimate finding of the trial judge. The plaintiff further submits that if there had been an objective and comprehensive consideration of PW1's evidence, no reasonable judge would have come to the conclusion reached by the trial judge, namely that the withdrawal and utilisation of the plaintiff's funds were an advance to HM Kamdar.

**[26]** The trial judge also rejected a special audit report prepared by accountants in relation to these four transactions at the behest of the Board of Directors of KGMB, to ascertain whether there was any wrongdoing in relation to these withdrawals and utilisation of the plaintiff's funds.

**[27]** The trial judge's basis for such rejection was that the special audit report was "incredulous" as it was stated to be against or contrary to "contemporaneous documents" and the testimony of PW1. The sole contemporaneous document in question was an accounts ledger filled by PW1, but on the instructions of HM Kamdar. The instructions were to treat the withdrawals from the plaintiff's account as "loans" or "advances" to HM Kamdar. The auditors who carried out the special audit report concluded that such entries in the ledger were not conclusive proof that the withdrawals were indeed loans or advances to HM Kamdar. Their reasons for so concluding were primarily based on the manner in which the monies were subsequently utilised. They concluded that simply labelling the withdrawals as loans or advances did not detract from the true nature of the transactions, namely the purchase of undersubscribed shares in relation to the KGMB listing, the utilisation of cash proceeds from the second cheque by either Bipinchandra or Jayesh, and the transfer of funds to Jayesh's account. The plaintiff maintains that the learned trial judge erred in fact and in law in so rejecting the audit report outright.

**[28]** It is evident from the foregoing that the crux of this appeal centres on the issue of whether the trial judge gave adequate or any proper consideration to the evidentiary record as a whole. If the plaintiff succeeds in

demonstrating that salient and relevant evidence was not considered or simply ignored, then this may warrant the conclusion that the findings of fact reached by the trial judge are plainly wrong.

**[29]** It is trite that an appellate court, in exercising its review function will rarely intervene where an appeal is premised on erroneous findings of fact, unless it can be shown that those findings are plainly wrong, given the evidentiary record. Put another way, an appellate court will not generally reverse findings of fact unless the trial judge made palpable and overriding errors of fact (see *Housen v. Nikolaisen* 2002 SCC 33, Supreme Court of Canada).

**[30]** In this case the plaintiff points out that notwithstanding the clear evidentiary record, the learned judge failed to consider or address whether there was any misapplication of the monies withdrawn from the plaintiff's account by Bipinchandra and/or Jayesh. The learned judge, it is further contended, also failed to consider whether Yap Kim Hong assisted Bipinchandra and/or Jayesh in housing and storing the undersubscribed shares in his CDS account and facilitating either Bipinchandra and/or Jayesh to derive secret profits from the dividends received in respect of those shares, as well as the sales proceeds of such shares.

**[31]** These are just a few of the grievances set out by the plaintiff in its memorandum of appeal. It is therefore necessary for this court to ascertain whether, in fact and in law, there was a failure to consider relevant evidence such that it materially affected the findings of the judge and resulted in a miscarriage of justice.

**[32]** Apart from errors of fact, it is contended further that the learned judge made errors of law in relation to his failure to appreciate the implications of a breach by directors under s. 132 of the Companies Act 1965, as well as common law pronouncements on the obligations of directors in a fiduciary position *vis-a-vis* a company. These grievances amount to errors of law.

**[33]** Ultimately the critical question to be answered by this court in the exercise of its review function may be summarised thus:

> On an objective assessment, are the trial judge's reasons in his judgment, considered in the context of the evidentiary record, the issues as they emerged at trial and the submissions of counsel, such as to warrant a conclusion that no reasonable judge could have come to the conclusion that the trial judge reached?

**[34]** In order to determine an answer to this question, it is necessary to consider in greater detail the salient facts of this case.

**Salient Facts And The Evidence At Trial**

**[35]** The salient facts are set out comprehensively in the appellant's submissions, and in part in the judgment. We adopt the same by way of summary below.

**[36]** Alongside the factual background we have also alluded to portions of the relevant evidence at trial, as well as issues which were not considered by the learned trial judge.

**[37]** As stated in the introduction, the plaintiff is a wholly owned subsidiary of a public listed company known as KGMB. KGMB was listed on 29 March 2005.

**[38]** At the time of the listing exercise, Bipinchandra was a director and the Deputy Chairman of the plaintiff while Jayesh was the Chief Executive Officer of the KGMB group including all its subsidiaries. The late HM Kamdar was the Chairman and a director of the Board of Directors of the plaintiff at that time.

**[39]** Yap Kim Hong was a close associate of Bipinchandra and Jayesh and enjoyed a business relationship with the plaintiff.

**[40]** The plaintiff's case centres around a sum of RM8,842,306 which was taken out from the plaintiff's account. The learned trial judge set out the withdrawals in the grounds of judgment as follows:

> 9. The first payment was through a MBB Cheque no 755640 for the sum of RM5,762,306.00 where the payee was Maybank Banking Berhad ("MBB"). It later transpired that this money was used to take up under-subscribed shares of KGMB in the pledged securities account of D3 who told the court that he was asked to be a nominee of DI. Those shares were later sold by D3.
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> 10. The second payment was for a sum of RM2,420,000.00 through a MBB Cheque No 756642 which was issued as a 'cash' cheque. The third payment was for a sum of RM580,000.00 through a MBB Cheque No. 756644 made payable to D2. D2 does not dispute receiving this money, the last payment was an inter transfer advise for the sum of RM80,000.00 from the account of the plaintiff to account of D2. D2 confirmed receiving this amount.
>
> 11. It is not in dispute that the four payments came from the accounts of the plaintiff and the signatory in each case was D1. These payment(s) [*sic*] can be summarised in the table that follows:

| Cheque No. | Date | RM | Payee as per cheque face | Signed by |
|---|---|---|---|---|
| MBB 755640 | 23.03.2005 | 5,762,306.00 | Malayan Banking Bhd | BB (one signatory) |
| MBB 756642 | 23.03.2005 | 2,420,000.00 | Cash | BB (one signatory) |
| MBB 756644 | 25.03.2005 | 580,000.00 | Jayesh R Kamdar a/l Rajnikant | BB (one signatory) |
| Inter transfer adv. | 26.03.2005 | 80,000.00 | Jayesh R Kamdar a/l Rajnikant | BB (one signatory) |

**[41]** From the foregoing, it is evident that the four transactions involving the withdrawal of the plaintiff's funds took place over a four day period, from 23 March 2005 to 26 March 2005. KGMB was then in the process of being listed.

**[42]** At that time, Bipinchandra and HM Kamdar were two of the four directors of the plaintiff. Jayesh was the Chief Executive Officer and Executive Director of KGMB. PW1 was the Group Finance Manager at the time.

**[43]** At that time a single signatory of the plaintiff could sign cheques with no limits stated. Bipinchandra was one of the authorised signatories at that time.

**[44]** The detailed sequence of events in relation to the withdrawal and utilisation of the plaintiff's funds is as follows:

**The First Cheque In The Sum Of RM5,762,305**

**[45]** The first cheque no. 756640 utilised to withdraw the plaintiff's funds was made out to Malayan Banking Berhad. It was in the sum of RM5,762,305.

**[46]** It will be recalled that at this time, KGMB was in the process of being listed. Some 4,801,920 shares were undersubscribed. The Board of Directors of KGMB had passed a resolution authorising MIDF Sisma Securities Sdn Bhd and/or its nominee to take up the entire 4,801,920 undersubscribed ordinary shares at RM1.20 per share, which amounted to RM5,762,305.

**[47]** In this context, *vide* letter dated 22 March 2005, MIDF Securities advised Mega Corporate Services Sdn Bhd that there would be a draft of RM5,762,305 for the purposes of taking up the undersubscribed portion of KGMB shares to be placed into a pledged securities account under the name of Yap Kim Hong.

**[48]** The evidential record further disclosed that some years later *vide* letters dated 20 February 2014 and 7 April 2014 addressed to Bursa Malaysia Berhad, Yap Kim Hong disclosed that he had acted as a nominee in the acquisition of the 4,801,920 undersubscribed shares at RM1.20 per share. The cost amounted to RM5,762,304, which monies emanated from the plaintiff's account. Yap Kim Hong further claimed that he was approached by Bipinchandra to utilise his name.

**[49]** He added in his second letter that the monies from dividends for 2006 and 2007 were transferred to Bipinchandra. The shares were later sold at a price of RM2,800,000 and Yap Kim Hong maintained that he was told to transfer the KGMB shares to another broker. The sale proceeds were to be given to Bipinchandra. On the latter's instructions however, Yap Kim Hong passed the sale proceeds in cash to Jayesh. There is a picture to support this statement, showing the boot of a car with large quantities of cash contained in a luggage bag.

**[50]** Bipinchandra denies that Yap Kim Hong was his nominee. He further denied giving instructions to Yap Kim Hong relating to the proceeds of sale of the KGMB shares.

**[51]** The learned trial judge also failed to consider the significant concession made by Bipinchandra in the course of cross-examination where he conceded that the plaintiff's monies from the first cheque transaction were not for listing expenses (or a loan) but were utilised to purchase KGMB shares.

**[52]** No findings nor inferences were drawn by the learned trial judge in relation to this evidence. It appears from the judgment that the learned trial judge failed to consider this portion of the evidence entirely.

**The Second Cheque In The Sum Of RM2,420,000**

**[53]** The second cheque was issued as a 'cash' cheque with the "A/C Payee Only" crossing cancelled off by the cheque signatory, namely Bipinchandra.

**[54]** The reverse side of the cheque contained two signatures, identified to be that of Bipinchandra and Jayesh. There was also a handwritten confirmation stipulating that PW1 of the plaintiff had been contacted with regards to the encashment.

**[55]** Jayesh maintains that he was called to the bank purely to sign on the reverse side of the cheque, and that he did not take the cash of proceeds of RM2,420,000. He maintains that it was Bipinchandra who received these proceeds.

**[56]** Bipinchandra stated that he did not take the proceeds of the cash cheque, but that Jayesh did so. He maintained that he acted on the instructions of HM Kamdar in relation to this cheque.

**[57]** It is contended for the plaintiff that either Bipinchandra or Jayesh took the cash proceeds of this cheque. The learned trial judge did not make any finding on this issue. It was simply not addressed. The reason appears to be that this transaction was characterised as a loan for HM Kamdar.

**The Third Cheque In The Sum Of RM580,000**

**[58]** This cheque was made payable to Jayesh. On the reverse side of the cheque an account number and telephone number was stated. The monies were banked into Jayesh's personal account.

**[59]** Jayesh testified that pursuant to a family meeting he had advised members of his family who were also shareholders in KGMB that he needed monies for the listing exercise in order to ensure that the price of KGMB shares on listing would be above RM1 per share. He further claimed that this sum was utilised for listing expenses.

**[60]** However he was unable to divulge precisely what these monies were expended upon in the course of the listing exercise, save for general statements to the effect that it was for advertising and pamphlets as well as expenses for various professionals. No details were provided. According to Jayesh, he submitted his claims to Bipinchandra directly. He further maintained that he was unaware that these monies emanated from the plaintiff.

**[61]** However Bipinchandra denied any such claims and maintained that there was no submission of any records or documents in respect of this expense claim in relation to the listing exercise.

**[62]** It is pertinent that in the course of presenting the costs of the listing exercise to the Board of Directors of KGMB, which amounted to RM2.23 million, this sum of RM580,000 did not feature as a part of the expenses. However Jayesh maintained in his testimony that this was because it was a 'family matter', whereby he had promised the shareholders a price above RM1.20.

**[63]** The learned trial judge did not address this issue or the evidence pertaining to it, namely the conflicting evidence of Bipinchandra and Jayesh, as well as the fact that the monies were ultimately banked into Jayesh's account.

**The Fourth Interbank Transfer Advice In The Sum Of RM80,000**

**[64]** The fourth withdrawal of the plaintiff's funds amounting to RM80,000 was by way of an interbank transfer advice for that sum into Jayesh's account. The request was made by Bipinchandra as evidenced *vide* letter dated 26 March 2003 addressed to Malayan Banking Berhad.

**[65]** Jayesh confirmed receipt of these monies and maintained that this sum was a commission for his having delivered a share price of RM1.20 on listing. He further stated that he did not know that the monies emanated from Kamdar Sdn Bhd.

**[66]** Notwithstanding this stance, the said sum was subsequently repaid by Jayesh to the plaintiff on 11 January 2011 by way of a bank deposit.

**[67]** Bipinchandra maintained that he had paid out this sum upon the verbal instructions of HM Kamdar.

**[68]** The trial judge concluded that this sum was also a loan to HM Kamdar based on the ledger entry and the evidence of PW1. There is nothing to indicate that he took into account or considered the evidence of Jayesh or Bipinchandra on this issue.

**The Recording Of These Four Withdrawal Transactions And Utilisation Of The Plaintiff's Monies**

**[69]** In the plaintiff's general ledger, the four withdrawal transactions were simply effected as a 'Debit' entry to HM Kamdar's account. Looking solely at the ledger and ignoring the rest of the evidence pertaining to the utilisation of the monies the impression given is that the four transactions were simply loans or advances given out to HM Kamdar.

**[70]** It will be recalled that PW1 in her testimony maintained that she recorded the four transactions as debit entries or loans at the behest of HM Kamdar. In point of fact, she maintained that she was so instructed in the course of a meeting where Bipinchandra, Jayesh and HM Kamdar were present. She further testified that she asked what the purpose for the withdrawal of such a large sum of money was to be utilised for. However she was told that she need not be told the reason. This portion of her evidence does not appear to be have been considered or taken into account by the learned trial judge in arriving at his conclusion that the withdrawals were loans to HM Kamdar. This evidence clearly shows that PW1 was unaware of how the plaintiff's monies were going to be utilised.

**[71]** The learned trial judge relied solely on a portion of PW1's testimony and the alleged 'contemporaneous' evidence of the general ledger debit entry to determine conclusively that the four transactions were loans to HM Kamdar which were subsequently repaid by the shareholders. In so doing, the learned trial judge did not consider how the monies were utilised in each instance as detailed above. That portion of the evidence or testimony appears to have been unheeded or disregarded in its entirety.

**[72]** In this context, it is relevant that there were no payment vouchers or any supporting documents available to support the debit entry in the general ledger. This runs awry of the normal accounting practice in the plaintiff which requires a payment voucher and other supporting documents such as an invoice stipulating the purpose of the payment etc. This comprised a part of PW1 testimony.

**[73]** There is no record of the alleged verbal instructions of HM Kamdar in relation to the utilisation of these monies. Neither is there any Board's approval for this use of the sum of RM8,842,306.

**[74]** This issue was not considered or commented upon by the learned trial judge.

**[75]** The learned trial judge also did not consider relevant portions of PW1's evidence. PW1 testified that if she had realised that the plaintiff's funds were, *inter alia*, utilised to purchase undersubscribed shares she would not have agreed to make such an advance as it was totally wrong to make such an advance of the plaintiff's funds. She admitted that it was contrary to the law. The trial judge did not consider this significant concession.

A **Deposit Of Funds By Shareholders**

**[76]** A few days after these withdrawal transactions there was a deposit of funds into the plaintiff by various shareholders between 28 March 2005 and 12 April 2005. There were a total of twelve (12) entries and deposits, totalling RM8,763,089.

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**[77]** The depositors were all shareholders who were also family members of the Kamdar family. There were no documented records to indicate the purpose of the deposits. The record of such repayments was tabulated as follows:

C

| Date | Quantum (RM) | Payer as recorded on pay-in slip |
|---|---|---|
| 28.03.2005 | 909,826.00 | Hamendra |
| 29.03.2005 | 50,000.00 | Mdm Sharda |
| 29.03.2005 | 50,000.00 | Mdm Sharda |
| 29.03.2005 | 50,000.00 | Mdm Sharda |
| 29.03.2005 | 32,116.56 | Mdm Sharda |
| 29.03.2005 | 6,016.44 | Sharda d/o Narandass |
| 29.03.2005 | 1,084,027.00 | Bipin Kamdar |
| 29.03.2005 | 200,074.00 | Khew Siew Khoo |
| 29.03.2005 | 39,654.00 | Paresh (Ipoh) |
| 29.03.2005 | 17,167.00 | Mr Jugal |
| 29.03.2005 | 5,926.00 | Dipakkumar |
| 29.03.2005 | 1,390,402.00 | Raj Family |
| 30.05.2005 | 1,867,905.00 | KM Family |
| 31.03.2005 | 2,623,917.00 | HM Kamdar |
| 12.04.2005 | 436,058.00 | – |

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**[78]** The learned trial judge, in relation to these entries, having already adjudicated that the withdrawals were loans to HM Kamdar, concluded that these deposits from various family member shareholders were repayments to the plaintiff of the loans afforded to HM Kamdar. This is what he said:

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> 26. The truth that emerges from the evidence, and this is my finding is that the deposits made in repayments of the plaintiff's loan were actually payments made by the promoters or shareholders according to the shareholding held by them. That is how this odd figure of RM1,867,905.00 came about as it represented 3.4 sen for each share held by Kamal and his family.

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27. There was testimony, which I accept, that HM Kamdar told the family members that the promoters/shareholders had to pay about 10 sen for each share held by them as listing expenses. The family members accordingly made the payments as they were accustomed to acting according to HM Kamdar's wishes.

29. In all probability, the promoters thought it was in their interest to pay for the listing expenses to increase the value of the share price. They must have paid for this reason. Whether payments actually went towards listing expenses is quite irrelevant here. This explains why none of them have ever complained about these payments much less take legal action to recover the same even after HM Kamdar's demise.

31. The evidence of repayment is equally compelling. By all accounts there was agreement that monies had been paid as shown in the ledger to the tune of RM8,763,091.00. A balance of RM79,215.00 remained unpaid. A sum of RM80,000.00 was repaid by D2 on 11 January 2011. These were clearly to my mind repayments on the loan to HM Kamdar. It is again curious as to why the auditors would not come to this view as they were well aware of the repayments recorded in the ledger. If this was wrongly recorded as they appear to suggest, then this ought to have been put to PW-1 who could then agree or disagree. As it stands her testimony corroborates what appears in the Ledger.

**[79]** It is evident from the foregoing that the learned judge concluded that the deposits were repayments because he had earlier concluded that the four withdrawals were loans or advances to HM Kamdar. This finding of fact therefore hinges on the veracity of the finding that the earlier withdrawals were in fact loans or advances.

**[80]** The learned judge failed to elucidate the evidence which he relied on to determine that HM Kamdar had told the members and shareholders to pay 10 sen per share that they held by way of listing expenses. HM Kamdar is deceased, and none of the shareholders or family members were called to testify to this effect.

**[81]** On the contrary, another witness Kamal Kumar Kishorchandra Kamdar, PW7 ('PW7') contended to the contrary and maintained that this was a loan by the depositors to the plaintiff. He did so in May 2011 after the Board of Directors were briefed about these four transactions. This demand was a precursor to the Special Audit Report and this action.

**[82]** Bipinchandra also contradicted himself materially on this issue. *Vide* letter dated 15 March 2011 he responded to PW7 and maintained that having looked into the accounts the amount paid by the shareholders was to repay a loan taken by HM Kamdar. As such, there was no outstanding amount due to any shareholder.

**[83]** But *vide* letter dated 27 April 2011 he stated, in response to a formal claim from PW6, that "he had found some discrepancies in the accounts and had no choice but to present these to the Board".

**[84]** He went on to detail the quantum of monies withdrawn from the plaintiff *vide* the four transactions, pointing out that the second, third and fourth cheques were all encashed or transferred to Jayesh.

**[85]** He then wrote as follows:

> The accounts ledgers show these withdrawals as loans to the late Mr H. M. Kamdar, our former Chairman. However none of these payments were ever made to him as is evident from the cheques.
>
> Several shareholders were asked to advance a loan to the company and these funds were used to cover these drawn funds in the company's bank accounts.
>
> These were shown in the company's account as repayments of the loan to H.M. Kamdar by the shareholders.
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> The shareholders who deny they were repaying any loan given to Mr. H.M. Kamdar dispute this fact.
>
> Athough I signed the cheques I do not know the purpose for the payments I was asked to do so by Mr. Jayesh Kamdar who said these were necessary for the purposes of the listing exercise which was being handled by him.

**[86]** Bipinchandra then concluded the letter by calling upon Jayesh to account for these withdrawals. This letter was sent to the Board of KGMB. (Although it was subsequently withdrawn by Bipinchandra, it was adduced at trial. Bipinchandra was cross-examined on this letter).

**[87]** The importance of this letter is that one of the defendants here expressly admits that although these withdrawals were described as a loan to HM Kamdar, none of the monies were utilised as such and were indeed utilised for wholly different purposes. Bipinchandra maintains that a considerable portion of the monies went to Jayesh. A sum in excess of RM5 million was utilised by the plaintiff to purchase over four million shares in its holding company, KGMB, for the purposes of increasing the price of KGMB shares on the date of listing. The legality of such a transaction warrants consideration given the purport of s. 67 of the Companies Act 1965.

**[88]** The learned trial judge failed to consider this salient and relevant letter and evidence adduced in the course of the trial. This letter is evidence of the fact that the signatory to the cheques disputed the withdrawals as being loans or advances to HM Kamdar, but instead stated that the monies were used to purchase KGMB shares and for Jayesh's use and/or benefit.

**[89]** In deeming the deposits as repayment of the loan, the learned judge failed to consider the evidence of PW2, Jugal Kishor Shivlal ('PW2'), who said that he was not aware of why he was asked to make a contribution save that he was told that it had something to do with the issue of shares. He was merely told that every shareholder was paying and he therefore complied.

**[90]** It is pertinent as stated before that none of the shareholders was called upon to testify that these deposits were repayments for advances taken out by HM Kamdar. As such there was no evidence from which it could be inferred that HM Kamdar "told" the shareholders that they had to pay 10 sen each for listing expenses. In any event, the monies were not utilised for listing expenses.

**[91]** The learned judge, having rejected the audit report because he found it "incredulous" in relation to its queries on the veracity of the withdrawals amounting to loans or advances to HM Kamdar, went on to reject the report in its entirety in relation to the deposits as well. The auditors concluded, on a consideration of the entirety of the evidence pertaining to these deposits that there was no conclusive evidence that these deposits were repayments for HM Kamdar's accounts, notwithstanding the recording in the general ledger.

**[92]** Their reasons for so concluding is premised on, *inter alia*, the evidence outlined above. They stated that while the series of deposits from the shareholders of KGMB could be contributions towards the undersubscribed shares, there was no conclusive evidence of the same. As such, they concluded that all the monies advanced to the plaintiff should be refunded to the relevant parties.

**[93]** This relevant evidence as outlined above was not considered in its entirety by the learned trial judge. It brings about a genuine query as to whether, in the light, particularly of Bipinchandra's evidence, these deposits were actually repayments or alternatively loans given by the shareholders of KGMB to the plaintiff.

**[94]** This point is fortified if the monies from the four transactions were not, in point of fact, loans or advances to HM Kamdar but simply unauthorised withdrawals from the plaintiff's account utilised to purchase KGMB shares, and the remaining monies encashed and utilised personally by Bipinchandra and/or Jayesh. In other words, monies withdrawn from the plaintiff without authorization or the knowledge of the board and utilised wrongfully.

**[95]** If so, then the deposits cannot be repayments of these alleged loans, but instead amount to independent payments made by the shareholders of KGMB to the plaintiff. They then become loans from the individual shareholders of KGMB to the plaintiff.

**[96]** However, the evidence above, pertaining to this possibility, as outlined by the auditors in their report, was simply not considered by the learned trial judge. Significantly, there was no consideration of whether such withdrawals could amount to a fraudulent breach of fiduciary duty or a breach of directors' duties under the provisions of the Companies Act 1965, notwithstanding the detailed pleadings of the plaintiff.

**[97]** As stated at the outset, by concluding that the primary or pivotal issue in this case was whether the withdrawals were in effect loans or advances to HM Kamdar, the plaintiff's case was effectively disregarded or went unheeded. The case and evidence as a whole was not considered in its entirety. Instead the learned trial judge honed in to the defence from the outset, thereby failing to accord the plaintiff's case any, or sufficient and relevant consideration.

**Other Relevant Evidence That Was Not Considered**

**[98]** Despite the voluminous evidence adduced at trial, no consideration appears to have been given to the evidence of, *inter alia*:

(i) PW2 who testified in relation to the deposits sought and procured from the family member shareholders of KGMB. As stated above, the thrust of his evidence was that he was told to make the deposit in line with his shareholding for 'listing' expenses but was told nothing else;

(ii) the evidence of the auditors, particularly Clement Cheong, PW5 ('PW5') who explained the audit report in detail, particularly why they had concluded that there was insufficient evidence to support the contention that the withdrawals were loans to HM Kamdar. In particular, this witness explained that the four withdrawals were not related to the business of the plaintiff. It was further pointed out that Bipinchandra and Jayesh, as the Deputy Chairman and director of the plaintiff and director and CEO of KGMB respectively, had breached their fiduciary duty as the monies were used for purposes other than the plaintiff's business purposes. The deposits, described as repayments were categorised as loans or advances to the plaintiff, which should be refunded to the relevant parties. There was little or insufficient consideration of this salient evidence, save from a general conclusion, premised on the ledger entry by PW1 that this report, in its entirety was "incredulous";

(iii) the evidence of Kamal Kumar Kishorchandra Kamdar, PW7 ('PW7') was not considered in its entirety. The learned trial judge simply concluded that PW7 was "less than candid" in his testimony to the effect that the deposits were in fact advances. To that end he issued a claim for a refund of the monies. The learned judge concluded that this was a guise because the witness had not pursued the claim in a court of law until it was time-barred. In so concluding the learned trial judge failed to consider that the true utilisation of these four withdrawals only came to light in or around 2010-2011. Prior to that, the fact of the withdrawals and the utilisation of the monies taken from the plaintiff were not known to the other directors of the plaintiff or the directors of KGMB.

The learned trial judge also failed to consider the rest of PW7's evidence as to when and how KGMB learnt of the utilisation of the plaintiff's monies and the manner in which it was sought to be resolved. This is

particularly pertinent to the issue of laches and/or limitation. However, no consideration was given to this salient portion of the factual background of this case, which explains why steps were only taken many years after the actual transactions;

(iv) the evidence of Bipinchandra where he largely disclaims knowledge or understanding of these four withdrawals. However, in the course of cross-examination he conceded that the utilisation of the monies for the purchase of undersubscribed shares of KGMB on listing was not in reality, a loan to HM Kamdar. There was no direct finding on the credibility of Bipinchandra, notwithstanding that he is a primary defendant in this case. Neither was the evidence of either Jayesh or Yap Kim Hong tested against his evidence. In short there was no or insufficient evaluation of the evidence of Bipinchandra against the conflicting testimony of his co-defendants;

(v) similarly there was insufficient consideration of Jayesh's evidence where he contended in the first place that he was neither a director nor officer of the plaintiff and therefore owed no fiduciary duty to the plaintiff. There was no consideration of whether Jayesh as the Chief Executive Officer and director of KGMB, the holding company of the plaintiff, was effectively a "shadow director" of the plaintiff as envisaged under the Companies Act 1965. There was also a failure to consider Jayesh's stance that Bipinchandra had taken all the monies received as dividends and sales proceeds from the first cheque and the cash from the second cheque for his own benefit and utilisation. There was no evaluation of such evidence as against Bipinchandra's evidence that three of the four withdrawals of monies from the plaintiff actually benefitted Jayesh and not himself, or that the monies had been utilised at the behest of Jayesh and on his instructions. There is no finding of fact on this crucial issue, given the clear evidence that three of the four withdrawals benefited either Bipinchandra or Jayesh or both of them;

(vi) there was no or insufficient consideration given to the evidence of Yap Kim Hong who testified that he was at all times a nominee of Bipinchandra in relation to the purchase of the undersubscribed shares of KGMB. As the monies for the purchase of these shares emanated from the plaintiff, it is evident that there is a clear link between the first transaction, the directors who authorised such utilisation of the monies and Yap Kim Hong. There was no consideration of Yap Kim Hong's evidence that dividends and sales proceeds were ultimately handed over to Bipinchandra and the final tranche to Jayesh on the direction of Bipinchandra. There were photographs showing these monies in cash contained in a luggage bag and stored in the boot of a car, to support his stance. Despite this, no finding was made by the learned trial judge on this significant issue;

(vii) PW1's evidence was not considered in its totality. PW1 testified significantly that she had no knowledge that the monies were utilised, *inter alia*, for the purposes of purchasing KGMB shares on listing. She maintained that this was contrary to the law. She reiterated time and time again that the entries in the general ledger were made as 'debits' purely on the instructions of HM Kamdar in the presence of Bipinchandra and Jayesh. The fact that she disclaimed knowledge of the nature of the transactions in respect of which the monies were utilised, appears to have been ignored. She further reiterated that the normal company practice of the plaintiff was that any advances or loans would be supported by documentary evidence such as payment vouchers and invoices, etc. However, the fact that there was no documentary evidence whatsoever to support these relatively large withdrawals (particularly the first, second and third) has been given no consideration whatsoever by the learned trial judge.

**[99]** It would therefore appear to us that a large expanse of material and relevant evidence adduced at trial was simply not considered by the trial judge. A reading of the full transcripts of both the evidence and submissions, and the judgment itself does not suggest that there was a complete review of material evidence.

**Function Of The Appellate Court**

**[100]** The primary function of the appellate courts is to review the decision of the trial court. For the purposes of such review, three categories of errors may arise, namely errors on findings of fact, errors of law or errors of mixed law and fact. It is axiomatic and trite that a review court like the Court of Appeal will only very rarely reverse a trial judge's findings of primary fact and then only if it is satisfied that the trial judge was plainly wrong. The authorities that support this proposition are far too numerous and trite to warrant detailed enumeration here. (see for example *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2010] 2 MLRA 668, *Thomas v. Thomas* [1947] AC 484 per Lord Thankerton, *Yuill v. Yuill* [1945] P 15, 19 per Lord Greene MR, and more recently in the United Kingdom, *Watson Farley and Williams v. Ostrovizky* [2015] EWCA Civ 457; *Fage UK Ltd v. Chobani UK Ltd* [2014] EWCA Civ 5, [2014] ETMR 26 (English Court of Appeal)).

**[101]** The position, namely that a Court of Appeal will only rarely contemplate reversing a trial judge's primary findings of fact, has been summarised aptly in the case of *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 by Lord Neuberger (at para. 53) thus:

> This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where the conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different opinion is no more likely to be right than the first).

**[102]** And as stated in *Elliston v. Glencore Services (UK) Ltd* [2016] EWCA CIV 407 (a decision of the Court of Appeal of UK):

> ... it is all too easy for an appellate court to criticise individual sentences or infelicities of language or reasoning of a trial judge, notwithstanding that at the end of the day his judgment on the entirety of the evidence may well have been correct. A judgment should be looked at in the round, particularly where the outcome depends on the judge's assessment of the credibility of the respective witnesses. It should not be picked over or construed as though it were a piece of legislation or a complex commercial contract. Nor should a judge be criticised for not mentioning every item of evidence.

This case clearly discourages a piecemeal criticism of a trial court's judgment.

**[103]** There are numerous other erudite expositions setting out why an appellate court in the exercise of its review function is loath to intervene in and reverse findings of primary fact made by a trial judge. In this context, we are well aware that a trial judge has the indubitable advantage of seeing the witnesses in real time and judging their demeanour. However, where a trial judge has clearly gone wrong in his approach to, and evaluation of, the evidence and an appellate court has the benefit of a full transcript, this advantage can be overstated.

**[104]** In the instant case after a comprehensive study and consideration of the full transcript, the documentary evidence, the pleadings, submissions and the judgment of the trial court we have concluded, with respect that the learned trial judge fell into error, *inter alia* in the following respects:

(i) the learned trial judge misunderstood or failed to consider the plaintiff's pleaded case, as stated at the outset. This is because he determined that the sole issue determinative of this case was whether the four transactions or withdrawals were in fact loans or advances to HM Kamdar. The plaintiff's causes of action premised on a fraudulent

breach of trust, breach of fiduciary duties and breaches of directors' duties were disregarded. This affected his approach to the plaintiff's case even before he came to consider the evidence;

(ii) the learned judge failed to appreciate the full purport of PW1's evidence (which he relied upon almost wholly) to conclude that the four withdrawals of the plaintiff's funds were loans to HM Kamdar. In this context, he failed to consider PW1's evidence that normally all loans were supported by documentary evidence. He also failed to appreciate the significance of PW1's evidence to the effect that she had no knowledge of how the monies were utilised and if she had known that they were being utilised to purchase KGMB shares she would have been concerned because that was an unlawful use of the plaintiff's monies;

(iii) perhaps more significantly, the learned judge failed to appreciate that PW1's evidence, at its highest, amounted to hearsay evidence in relation to the utilisation of the plaintiff's funds. This is because PW1 acted on instructions to make entries in relation to the withdrawals as loans to HM Kamdar in the general ledger of the plaintiff. To that extent, PW1's evidence only goes to the truth of her assertion that she was told to record these transactions as loans. Her evidence therefore cannot amount to primary evidence of the nature or purpose of the withdrawals as she admitted that she had no knowledge of the same. The truth of the nature of the transactions and the utilisation of the plaintiff's monies in actuality may only be gleaned from Bipinchandra, Jayesh and/or the documentary evidence underlying those transactions. The learned judge however failed to consider or pay heed to the material evidence underlying the transactions which disclosed that the monies had been utilised to purchase undersubscribed shares of KGMB and, possibly, for utilisation by Bipinchandra and/or Jayesh;

(iv) the learned judge erred in placing undue weight on the ledger entries and their description on the basis that it was contemporaneous evidence of the utilisation of the funds. In so doing the learned judge failed to consider, as stated above, that the entries were mere 'hearsay' entries by PW1 at the behest of HM Kamdar and/or Jayesh and Bipinchandra. He failed to give any or adequate consideration to the underlying documents such as the letters pertaining to the first withdrawal, the encashment of the second withdrawal, the third withdrawal and the interbank transfer of the fourth withdrawal. In this context, these underlying documents were neither referred to nor evaluated. While it is not necessary to mention or itemise every piece of evidence, these documents are fundamental to ascertaining the true nature of the four transactions and ought therefore to have been given adequate consideration and evaluation;

(v) the learned judge failed to provide adequate reasoning for his outright rejection of the special audit report and the evidence of the auditors. As stated above, the learned judge rejected the report on the basis that it was 'incredulous' as it did not rely on PW1's evidence and the general ledger to conclude that the withdrawals were loans or advances. However as stated above, the determination that PW1's evidence and the general ledger entries are conclusive proof of the nature and purpose of the withdrawals is flawed because the learned judge failed to consider that these entries were mere hearsay, entered upon the instructions of other persons. The learned judge failed to recognise that in order to ascertain the true nature of the withdrawals it was necessary to consider the documentary evidence, which showed the utilisation of the funds. The auditors did in fact do so, and reached conclusions premised upon such documentary evidence, as well as the absence of documentary evidence in support of the contention that the withdrawals were all loans to HM Kamdar. The learned judge failed to give any or adequate consideration to the special audit report in this context. While the trial judge may well choose to disregard or reject the Special Audit Report, such a step should only be undertaken after an adequate consideration of their report coupled with clear and sound reasoning for such rejection. His reasons for rejecting the report are therefore insufficient and inadequate;

(vi) the caselaw in relation to the acceptance and rejection of an expert opinion is well set out in the Singapore case of *Dr Lo Sook Ling Adela v. Au Mei Yin Christina & Anor* [2002] 1 SLR 408 where the Singapore Court of Appeal in discussing the evidence of a professor of botany on the age of a belimbing tree in a dispute involving a claim of adverse possession stated:

> It is true that the age of the Belimbing tree, being 20 years old, was only an estimate. Because it was an estimate, the trial judge could not accept the evidence of Prof Rao. In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds: see *Saeng-Un Udom v. PP* [2001] 3 SLR 1 at 8-9. We did not think just because the age given was an estimate, that that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a matter of judgment. This was a scientific issue outside the learning of a judge.

(vii) the foregoing case was considered in the Malaysian case of *Majuikan Sdn Bhd v. Barclays Bank plc* [2014] 9 CLJ 337; [2015] 1 MLJ 171 where this court cited with approval the passage from *Dr Lo Sook Ling Adela*:

> We are in agreement with these principles and in our view, a judge who is not an expert himself should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case.

And as stated in the case of *Sakthivel Punithavathi v. PP* [2007] 2 SLR 983:

> 76 What is axiomatic is that a judge is not entitled to substitute his own views for those of an uncontradicted expert's: *Saeng-Un Udom v. PP* [2001] 3 SLR 1. Be that as it may a court must not on the other hand unquestioningly accept, unchallenged evidence. Evidence must invariably be sifted, weighed and evaluated in the context of the factual matrix and in particular the objective facts. An expert's opinion "should not fly in the face of proven extrinsic facts relevant to the matter" per Yong Pung How CJ in *Dr KHoo James v. Gunapathy d/o Muniandy* [2002] 2 SLR 414 at [65]. In reality, substantially the same rules apply to the evaluation of expert testimony as they would to other categories of witness testimony. Content credibility, evidence of partiality, coherence and a need to analyse the evidence in the context of established facts remain vital considerations; demeanour however more often than not recedes into the background as a yardstick.

(viii) the learned judge failed to give any consideration to the evidence of the auditors, particularly PW5. No reasons were accorded for the rejection of his evidence. The evidence of the auditors was simply not referred to;

(ix) similarly as outlined above, the learned judge failed to give consideration to the entirety of PW7's evidence in relation to when the Board of KGMB found out about these four transactions which was material to the issue of laches and limitation;

(x) no consideration was given to the evidence of another independent director of KGMB who spearheaded the procurement of the special audit report, namely Ong Liang Beng, PW6 ('PW6') who similarly explained how the Board came to examine these four transactions in 2010–2011, resulting in this suit. This too is germane to the issue of laches and limitation, particularly in relation to whether this was a case of a fraudulent breach of trust;

(xi) as outlined above in detail, the learned trial judge failed to give consideration to the evidence of the defendants, or to make findings in relation to their credibility. Given the considerable documentary and oral evidence (particularly from Yap Kim Hong) as to the utilisation of the plaintiff's funds (and even the taking of dividends and sales proceeds well after 2005), no findings were made as to whether the directors had personally benefited from the plaintiff's funds. This was the crux of the plaintiff's case and the defendants' defence, yet there was no examination of the elements of a breach of trust, breach of fiduciary duty or breaches of directors' duties;

(xii) Yap Kim Hong's evidence which is particularly material and relevant appears not to have been considered in its entirety. This goes to the root of the issue of breach of trust and breach of fiduciary duty, yet no findings were made on his evidence. It should either have been accepted or rejected with suitable reasoning. In this context there was documentary evidence available to support some of the contentions raised, yet this evidence was not touched upon. It is relevant evidence that warrants consideration and either acceptance or rejection. The failure to address this evidence is an error of law;

(xiii) in relation to the deposits by family member shareholders the learned trial judge made speculative findings unsupported by any evidence, to the effect that they amounted to a repayment of the loans to HM Kamdar;

(xiv) the learned judge failed to take into account the background or context leading up to the procurement of a special audit report to ascertain the true nature of these ledger entries. This is pertinent to the issue of laches and limitation, yet no consideration was given to the same. Instead, the learned judge concluded, ignoring this salient evidence, that laches and limitation applied because action was only taken some nine years after the event. He failed to consider the date on which actual knowledge was attributable to the other directors of KGMB who were under a duty and obligation to do so. This too amounts to an error of law;

(xv) the learned judge failed to appreciate that the plaintiff's cause of action included a fraudulent breach of trust as particularised by the plaintiff in para. 38 of the statement of claim, as well as its submissions. The failure to do so affected his finding that laches and limitation precluded the plaintiff from bringing this claim against the defendants. In summary, the learned judge failed to consider the salient fact that the plaintiff's Board of Directors only discovered the full extent of the defendants' alleged misconduct in or around 2011 and fully so between 2013 and 2014.

(xvi) the learned judge failed to consider whether Jayesh as the Chief Executive Officer and director of KGMB, the holding company of the plaintiff at the material time, was liable to the plaintiff for breach of fiduciary duty, despite not having been appointed as a director of the subsidiary company. In this context, the fiduciary and other duties which a director owes to a company which appoints him apply equally to someone who has not been formally appointed but nonetheless acts as a director. ('a *de facto* director'); alternatively the learned trial judge failed to consider whether Jayesh was a 'shadow director' as understood in company law;

(xvii) the learned judge, in evaluating the evidence as a whole, failed to consider material and relevant evidence and relied primarily on part of the evidence of one witness to reach a conclusion determinative of the entire case, but failed to consider the pleaded case of the plaintiff. The nett result is that the plaintiff was not accorded a reasonable opportunity to be heard in full;

(xviii) the learned judge misdirected himself when he concluded that any misapplication of a company's property is a matter for the authorities to take action. In so concluding, he failed to realise the significance of the plaintiff's plea of a breach of fiduciary duties and a breach of directors' duties;

(xix) the learned judge erred in law in relying on texts from *Snell's Equity*, 31st edn to determine that the plaintiff's action was caught by limitation. He failed to consider that the authors specifically provided that a director of a company who obtains property from the company in breach of fiduciary duty, holds that property as a constructive trustee and cannot assert a limitation period against a claim to the return of the property, as his obligations as a trustee in relation to that property predate the transaction by which it was conveyed to him;

(xx) the learned judge also relied on the case of *Gwembe Valley Development Company Ltd v. Koshy* [2003] EWCA Civ 1048 but erred in concluding that it supported a defence of limitation. Mummery II speaking for the Court of Appeal instead held, *inter alia*, as follows:

> [97] The most recent of the Court of Appeal cases is *JJ Harrison (Properties) ltd v. Harrison* [2002] 1 BCLC 162 in which a company director who had failed to make sufficient disclosure of his interest on the purchase of a property from the company some 11 years before proceedings were commenced, was held liable to account to the company for the profits made by him from the transaction
>
> [100] As for limitation, Chadwick LJ held that Mr Harrison was prevented by s. 21(1)(b) of the 1980 Act from raising such a defence. The claim against him was for taking a transfer of the company's property to himself in the context of an abuse of

trust and confidence reposed in him as a director. He was to be treated as a trustee falling within the first class of case in Paragon. For the purposes of s. 21(1)(b), the 'beneficiary' was the company, 'the trustee' was the director and 'the trust property' was the property transferred from the company to the director. The defence of laches was also rejected. As the defendant director had already sold the property in question the proper remedy was for an account of the value of the property and all other profits.

The rationale behind this is that if the directors were permitted to rely on limitation, they would have benefited from the monies they had wrongfully taken from the plaintiff, which they ought not to have, to the ultimate detriment of the plaintiff company. The directors ought not to profit from a breach of trust, which is why limitation does not apply as expressly provided for in s. 22 (1)(a) and/or s. 22(1)(b) of the Limitation Act 1953 in relation to, respectively, fraudulent breach of trust and recovery of trust property from a trustee, as constructive trustee. The learned judge concluded that there was "insufficient evidence" that any trust property or trust proceeds were previously in the possession of the defendants or converted to their use. By so concluding the learned judge effectively ignored all the documentary evidence relating to the utilisation of the funds, as well as the oral evidence at trial in this respect.

Cases such as *Yong Kheng Leong and Another v. Panweld Trading Pte Ltd and Another* [2012] SGCA 59, a decision of the Singapore Court of Appeal, support this stance and categorise directors who have acted in breach of trust as constructive trustees over the assets of the company which they had misappropriated. As such, they are denied any limitation defence, compared to Class 2 trustees who may avail themselves of such a defence. The line between Class 1 and Class 2 constructive trustees turns on whether the trust or trust-like relationship existed even before the wrongful transaction in question, in which case, it would be a Class 1 trustee.

The learned trial judge fell into error when relying on these authorities to hold that limitation applied to preclude the plaintiff's claim.

(xxi) the learned judge fell into error when he held that the doctrine of laches applied on the facts of this case and that precluded the plaintiff from being granted a remedy. In this context, the learned judge failed to consider the evidence adduced at trial to the effect that the four impugned transactions relating to the plaintiff's monies were kept within the knowledge of only Bipinchandra and Jayesh and never reported to the plaintiff's Board of Directors or the shareholders at general meetings. In other words, the withdrawal and utilisation of the plaintiff's monies in this manner was kept concealed from the other

directors of the plaintiff and KGMB as well as the shareholders, until full disclosure came about *vide* the special audit report in April 2014. Prior to this, there had been queries made by the Board of KGMB, but no satisfactory answers were received until, at the earliest, 2011 (*vide* Bipinchandra's letter of 27 April 2011) and finally by way of the audit report in 2014;

The learned judge disregarded this salient evidence determining that time began to run from the date when these withdrawals were effected. The learned judge further relied on the "knowledge" of the payments by PW1 to determine that laches applied. This is a flawed basis on which to found the defence of laches, as it is evident from a proper perusal of PW1's evidence that she had no knowledge of what the plaintiff's monies were to be utilised for at the material time.

**Should The Appellate Court In Its Review Function Reverse The Findings Of The Learned Trial Judge Or Remit The Case For Re-Hearing When A Considerable Expanse Of Material Evidence Led At Trial Is Not Considered, And Inadequate Findings Are Reached?**

**[105]** Having concluded that there were errors of fact, law and mixed law and fact, this court was faced with the somewhat vexed question of whether it should, on the basis of the evidential record contained in the transcript, make primary findings of fact and determine the numerous factual and legal findings that are required in order to arrive at a reasoned decision on the totality of the evidence. This would effectively mean that this court has to step into the shoes of the trial court. This was not a tenable step to take for, *inter alia*, the following reasons:

(i) the expertise of a trial judge is supposed to encompass a determination of the facts relevant to the legal issues to be decided and what those facts are when they are disputed. This does not fall within the province of an appellate court which carries out a purely review function;

(ii) the resources of an appellate court are limited and it would be a considerable drain on this court's function to undertake afresh the function of a trial judge. Duplication of the trial judge's role on appeal is unwarranted and a disproportionate use of the limited resources of this court. This is particularly so where the trial judge fails to consider considerable expanses of the evidence adduced at trial, comprising relevant and material evidence;

(iii) the position is somewhat different where a trial judge undertakes a comprehensive and meticulous consideration of the case, but nonetheless errs on inferences drawn from factual findings, and is found to be plainly wrong; or where errors of law are committed which need correction, or where erroneous conclusions are reached on mixed questions of law and fact. In such instances, it is a relatively simpler task

for an appellate court to exercise its review function, identify any errors that fall within the three categories stated above and to subsequently correct those errors by reversing flawed findings made by a judge;

(iv) but where no such primary findings are made, it is difficult and unfeasible for an appellate court to take on this task. In the instant case, such an exercise would require this court to make primary findings of fact, particularly in relation to the many witnesses whose evidence was disregarded, premised on a transcript alone. More significantly the crux of this case turns on an allegation of dishonest utilisation of the plaintiff's funds by directors of the plaintiff. It is difficult for this court to make a finding in relation to such an allegation on the basis of transcripts alone, without any primary findings of fact by the trial judge.

**[106]** In the Privy Council case of *Beacon Insurance Company Limited v. Maharaj Bookstore Limited* [2014] UKPC 21, an appeal from the Court of Appeal of the Republic of Trinidad and Tobago, the appeal related to, an insurance claim which was rejected on the grounds that part of it was fraudulent or had involved fraudulent devices. The principal issue for consideration was whether the Court of Appeal was entitled to overturn the findings of fact made by the judge at first instance. The Privy Council determined that the Court of Appeal was not entitled to so interfere.

**[107]** A perusal of this case discloses that the issue of fraud depended fundamentally on an evaluation of the written and oral testimony of the witnesses whom the trial judge saw and heard. The Privy Council held that his assessment of the presence or absence of fraudulent intention could only be displaced on the clearest grounds.

**[108]** However, a consideration of the trial judge's judgment (which was undertaken by the Privy Council) discloses that the trial judge undertook a meticulous and detailed consideration of all aspects of the case. Most importantly, he identified and undertook a detailed consideration of the evidence on record as a whole before coming to his conclusion that there was no fraud. The Court of Appeal reversed the findings of the trial judge on the basis of two errors of law. They also reversed findings of fact in relation to the credibility of several witnesses. The Privy Council found that the Court of Appeal had no proper basis for concluding that the trial judge had gone plainly wrong in his assessment of the evidence. It had erred in substituting its views on critical questions. The trial judge it was held had sufficient evidential basis for arriving at the conclusions he did.

**[109]** The difference in this case is that given the evidential record, pleadings and submissions, there is an absence of key findings, and an inadequate consideration of the evidential record. This effectively precludes this court from undertaking a comprehensive review of this appeal. It will be noted in this context that in most cases there is great deference accorded

to the findings of the trial judge, but it is equally clear that in these cases the trial judge has undertaken a complete consideration of the totality of the evidence prior to arriving at his decision.

**[110]** Ultimately appellate courts are faced with this critical question in a case like this: Do the trial judge's reasons considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to a meaningful appellate review?

**[111]** The answer is a resounding yes. The appellant's case and the respondents' case, as stated before, was not heard nor considered in full. This amounts to a breach of natural justice. We are satisfied that there has been a miscarriage of justice in the hearing of this suit. We therefore allow the appeal and set aside the judgment of the High Court.

**[112]** In these circumstances we have no option but to reluctantly remit this case for re-hearing to the High Court. It would not be tenable for this court to undertake the task of making primary findings of fact in respect of the numerous issues that have not been addressed in the current judgment.

**[113]** We would therefore make the following orders in relation to the remittance of this case for re-hearing before a different judge:

(i) the transcript of the evidential record is to be preserved and retained for the purposes of a re-hearing in order to save time, resources and to ensure the veracity of the evidence given by the various witnesses;

(ii) the trial judge however is at complete liberty to recall witnesses for further testimony as he deems fit in order to adjudicate upon this case comprehensively;

(iii) the trial judge is at liberty to give any further directions as he deems fit to expedite the trial of this matter.

**[114]** Each party is to bear its own costs. The deposit is refunded.